Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JACKIE SANDERS

Petitioner,

v.

EXXON CORPORATION d/b/a
EXXON COMPANY, U.S.A.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED

Prior to *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 U.S.L.W. 4480 (June 12, 2000), the District Court and the Fifth Circuit, respectively, granted and affirmed summary judgment for Respondent on Petitioner's Title VII and 42 U.S.C. § 1981 retaliation claims.

Are the lower court opinions consistent with *Reeves*?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. THE DISTRICT COURT AND THE FIFTH CIRCUIT IGNORED CRITICAL EVIDENCE INDICATING THAT EXXON DEMOTED AND CONSTRUCTIVELY DISCHARGED JACKIE SANDERS IN RETALIATION FOR HER OPPOSITION TO THE COMPANY'S DISCRIMINATION 5

II. THE DISTRICT COURT IMPERMISSIBLY CREDITED THE SELF-SERVING, CONTROVERTED TESTIMONY OF EXXON MANAGEMENT 6

III. THE DISTRICT COURT DREW ALL REASONABLE FACTUAL INFERENCES IN FAVOR OF EXXON AND AGAINST JACKIE SANDERS 8

CONCLUSION 11

APPENDIX A
District Court Memorandum and Order on Summary Judgment 1a

APPENDIX B
Fifth Circuit Panel Opinion 1b

APPENDIX C
Fifth Circuit *En Banc* Opinion 1c

TABLE OF AUTHORITIES

FEDERAL CASES

Barrow v. New Orleans Steamship Association, 10 F.3d 292 (5th Cir. 1994) 6

Reeves v. Sanderson Plumbing *Products, Inc.*, 120 S. Ct. 2097, 68 U.S.L.W. 4480 (June 12, 2000) 1, 2, 4, 5, 6, 8, 10, 11

Sanders v. Exxon Corp., 210 F.3d 369 (5th Cir. 2000) 1

FEDERAL STATUTES

28 U.S.C. §§ 1254(1) and 2106 1

42 U.S.C. § 1981 ..... 1, 2, 4

42 U.S.C. § 1981a (c)(1) (1994) 2

42 U.S.C. § 2000e-3 (1994) 1

OPINIONS BELOW

The District Court granted summary judgment and entered Final Judgment for Exxon on May 10, 1999. The unpublished District Court Memorandum and Order granting summary judgment appears in Appendix A. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court's judgment appears at *Sanders v. Exxon Corp.*, 210 F.3d 369 (5th Cir. 2000) (unpublished) and in Appendix B. The Fifth Circuit's denial of Ms. Sanders' Petition for Rehearing *En Banc* appears in Appendix C.

JURISDICTION

On May 10. 1999, the District Court entered Final Judgment for Exxon, from which Jackie Sanders timely appealed. *See* Appendix C. On February 18, 2000, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's Final Judgment. *Sanders v. Exxon Corp.*, 210 F.3d 369 (5th Cir. 2000); Appendix B. On April 5, 2000, the Fifth Circuit denied Jackie Sanders' Petition for Rehearing *En Banc*. *See* Appendix A.This Petition for Writ of Certiorari is filed within ninety days of the Fifth Circuit's denial of the Petition for Rehearing *En Banc*. Therefore, the Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Seventh Amendment, United States Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C § 2000e-3 (1994)

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training, or retraining, including on-

the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 1981a (c)(1) (1994)

If a complaining party seeks compensatory or punitive damages under this section—any party may demand a trial by jury

STATEMENT OF THE CASE

Jackie Sanders filed suit against Exxon Corporation on November 26, 1997, alleging that, in violation of Title VII and 42 U.S.C. § 1981, the company had retaliated against her for opposing its race discrimination against minority employees. Sanders requested a jury trial.

Although the parties vigorously contested numerous material facts, the District Court granted Exxon summary judgment on all Sanders' claims. The Fifth Circuit summarily affirmed. The question before the Court is whether, in the light of *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 U.S.L.W. 4480 (June 12, 2000), a jury, not a judge, should have resolved the substantive factual disputes.

Several facts are undisputed. Jackie Sanders worked for Exxon as an oil and gas accountant and accounting supervisor from 1977 to 1997. Prior to 1995, Exxon promoted Sanders five times and considered her one of its "highest potential" employees.[1]

From April, 1995 to November, 1995 Ms. Sanders — then a Senior Revenue Accounting Supervisor in Exxon USA's Controllers division — repeatedly opposed her supervisor, Gary Schott's, discrimination against minority accountants. Ms. Sanders—a white female—repeatedly confronted Schott about the disproportionately low performance rankings of the minority accountants under his supervision and his failure to accord them high-profile assignments and promotional opportunities. A 1996 Exxon EEO investigation substantiated Sanders' allegation concerning the minority rankings, finding that the minority accountants under Schott's supervision were ranked, on average, **25 points** below their white counterparts.[2]

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[1] R 1/978, Exhibit N, at 79.

[2] R 2/2 (referencing Exxon's sealed EEO report). At Exxon, an employee's ranking

In November, 1995—shortly after Sanders objected to Schott's demand that she write a negative performance evaluation for an Asian-American accountant under her supervision—Exxon removed Sanders from her supervisory position and transferred her to an unchallenging, non-supervisory position in Upstream Financial Services ("UFS") that had previously been filled by entry-level employees.[3] In September, 1996—less than one month after Sanders protested her demotion and the underlying race discrimination to Exxon management and filed a Charge of Discrimination with the EEOC—Exxon declared Sanders psychologically unfit for work and placed her on medical leave.[4]

After Sanders returned from medical leave in December, 1996 and, over Exxon's Controller's objections, continued to cooperate with the EEOC,[5] Exxon management—acting pursuant to the Controller's directive[6]—repeatedly subjected Sanders to **"hard counseling"** for alleged performance problems[7]; stripped her of a special assignment on which she was doing a "great job"[8]; and accelerated deadlines for her to complete her work.[9] Then, in July, 1997—less than three weeks after Sanders rejected Exxon's offer to settle her EEOC Charge[10]—Exxon management, despite knowing of Sanders' continuing depression,[11] once again subjected her to a "hard counseling" session that reduced her to tears and caused her to become ill.[12] Having debilitated Sanders, Exxon once again declared her psychologically unfit for work and placed her on medical leave.[13] Suffering from depression and Post-Traumatic Stress caused by Exxon's demotion and long-term harassment, Sanders resigned her employment on October 17, 1997.

After exhausting her administrative remedies, Sanders sued Exxon under Title VII, 42 U.S.C. § 1981, alleging that the company had demoted and constructively discharged her in retaliation for opposing its race discrimination internally and filing a Charge of Discrimination with the EEOC.[14] Although it conceded that Sanders had opposed, in good faith, its

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determines her eligibility for salary increases and promotions, as well as lay-offs.

[3] R 1/915 (and related Exhibit 2); R 2/Exhibit I; R 2/Exhibit K; R 1/857-858

[4] R 1/915.

[5] Sanders provided the EEOC with substantial statistical data demonstrating that Exxon had ranked the minority accountants under Schott's supervision disproportionately lower than their white counterparts. R 1/1056-1057.

[6] R 1/854; R 1 978, Exhibit N, at 213, 215 (emphasis added).

[7] R 1 913.

[8] R 1/914; R 1 978, Exhibit O, at 121.

[9] R 2/Exhibit A, at 446-447.

[10] R 1/1056-1057.

[11] R 2/Exhibit I(2).

[12] R 1 912.

[13] R 1/912.

[14] Sanders also alleged that Exxon subjected her to the intentional infliction of emotional

allegedly discriminatory employment practices, Exxon denied subjecting Sanders to any unlawful retaliation and claimed that all of its actions towards Sanders were benign and motivated by its concern for her well-being.

Despite the parties' conflicting evidence, the District Court granted Exxon's Motion for Summary Judgment. The District Court found that Sanders had opposed, in good faith, Exxon's alleged employment discrimination and assumed *arguendo* that Exxon had subsequently demoted her. However, the District Court summarily concluded that Sanders' opposition to Schott's discrimination did not "cause" her demotion, despite an Exxon EEO investigation that found that Schott **"jointly"** decided to transfer Sanders from her supervisory position.[15] The District Court likewise concluded that, despite Sanders' evidence of demotion, reduced pay increases,[16] and persistent harassment by Exxon management, Sanders had not raised a fact issue that a reasonable person in her position would have felt compelled to resign.

In a one-line *per curiam* opinion, the Fifth Circuit summarily affirmed the District Court's judgment. The Fifth Circuit similarly denied Sanders' petition for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

This case presents, in the summary judgment context, the issues addressed in *Reeves v. Sanderson Pluming Products, Inc.*, 120 S.Ct. 2097, 68 U.S.L.W. 4480 (June 12, 2000). *Reeves* held that lower courts err by failing to credit the employee's *prima facie* case and evidence challenging the employer's "legitimate, non-discriminatory reasons" in determining, as a matter of law, that the employee failed to prove Title VII discrimination. Lower courts further err by crediting the employer's self-serving testimony, when such testimony is impeached or contradicted, and by failing to draw all reasonable factual inferences in favor of the employee. In this case, the District Court and the Fifth Circuit—acting prior to *Reeves*—applied the very mistaken standard that the Fifth Circuit earlier used, and this Court invalidated, in *Reeves*. Therefore, the Court should vacate and remand those decisions for reconsideration in the light of *Reeves*.

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distress, in violation of Texas law.

[15] R 1/847 (emphasis added).

[16] In the three year period after she opposed Exxon's discrimination, Sanders' average annual raise **decreased** from $5,500.00 to approximately $600.00, while the average annual raise for similarly situated Exxon Controllers employees **increased** from $4,100.00 to $6,700.00. R 1/911.

I. THE DISTRICT COURT AND THE FIFTH CIRCUIT IGNORED CRITICAL EVIDENCE INDICATING THAT EXXON DEMOTED AND CONSTRUCTIVELY DISCHARGED JACKIE SANDERS IN RETALIATION FOR HER OPPOSITION TO THE COMPANY'S DISCRIMINATION

Reeves established that, on summary judgment in Title VII cases, lower courts must credit the employee's evidence establishing a *prima facie* case of discrimination and challenging the employer's "legitimate, non-discriminatory reasons" for the alleged adverse employment action. *Reeves*, 68 U.S.L.W. at 4484. Here, as in *Reeves*, the District Court failed to credit Sanders' evidence that Exxon demoted and constructively discharged her for opposing its alleged discrimination and her evidence establishing that Exxon's proffered reasons for these adverse actions were false.

With respect to Sanders' retaliatory demotion claim, the District Court failed to credit Sanders' evidence—derived from an Exxon internal EEO report—that her supervisor, Gary Schott, "jointly" decided to remove Sanders from her supervisory position within six months of her first opposition to his alleged discrimination. The District Court further failed to credit Sanders' evidence demonstrating that Exxon's professed "business reasons" for transferring her to UFS—that Sanders was having "interpersonal problems with some of her subordinates" and had long sought such a transfer—were false and, therefore, pretexts for retaliation. Such evidence included glowing testimonials from Sanders' former subordinates[17]; Sanders' repeated requests not to be transferred to UFS in 1995[18]; and Exxon's failure to transfer a similarly situated Revenue Accounting supervisor (Darrell Call), whose conduct towards his subordinates had resulted in negative employment evaluations and a Title VII lawsuit against the company for sex and race discrimination.[19]

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[17] Sanders' subordinates testified that she was an "excellent supervisor" who was "smart" and "professional"; and, further, that Sanders "gave them a chance" and would not stand for them being mistreated in any way. R 2/101, Exhibit F, Exhibit N, and Exhibit M.

[18] Sanders requested that she not be transferred to UFS in June, 1995 and, again, in November, 1995 because of her concern that its overtime requirements would have prevented her from caring for her mother, who was recuperating from a series of strokes. R 1/917; R 4/353, Exhibit 1, at 132-133, 209, 212-214. In light of Sanders' family situation, Exxon allowed her to remain in Revenue Accounting in June, 1995 but declined to do so in November, 1995.

[19] R 1/1083 (sealed Exhibit B and Exhibit C). Exxon did not dispute Call's sordid work history and offered no explanation for why it transferred Sanders, instead of him.

With respect to her retaliatory constructive discharge claim, the District Court failed to credit Sanders' *prima facie* case.[20] Specifically, the District Court failed to credit Sanders' demotion, the related reduction in job responsibilities, the menial and degrading nature of her new position, and her decreased pay raises. The District Court's failure to credit such evidence allowed it to summarily conclude that "[a]lthough Sanders appeared to be genuinely distressed and may have been rudely treated on a few occasions, the incidents she relates would not have caused a reasonable person to resign."[21]

II. THE DISTRICT COURT IMPERMISSIBLY CREDITED THE SELF-SERVING, CONTROVERTED TESTIMONY OF EXXON MANAGEMENT

Reeves also established clear and important limitations on the extent to which lower courts could rely upon the moving party's controverted evidence in adjudicating FRCP 56 motions for summary judgment. The Court held:

> [T]he court must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the non-movant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.' *Reeves*, 68 U.S.L.W. at 4484 (citations omitted).

In granting Exxon summary judgment, the District Court relied almost exclusively on controverted affidavits from Exxon management.

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[20] In *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994), the Fifth Circuit held that, in order to establish a *prima facie* case of constructive discharge under Title VII, an employee need only "offer evidence that the employer made the employee's working conditions so intolerable that a reasonable person would feel compelled to resign." To determine whether a reasonable person would have felt compelled to resign, the Fifth Circuit stated that the following factors should be considered, either "singly or in combination":

1. demotion;
2. reduction in salary;
3. reduction in job responsibilities;
4. reassignment to menial or degrading work;
5. reassignment to work under a younger supervisor;
6. badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; and
7. offers of early retirement

[21] *See* Appendix A, at 18a.

For example, in support of its conclusion that Exxon did not harass and constructively discharge Sanders, the District Court noted:

> Affidavits or deposition testimony from Templeton [Exxon USA Controllers, Planning and Controls Manager], Brittan [Exxon USA Controllers, UFS Manager], Hayes [Exxon USA Controllers, Human Resources], and Lawhorn [Exxon Nurse] indicates that they acted out of concern for Sanders' emotional health, and — most importantly — upon the orders of Sanders physicians."[22]

Indeed, the District Court adopted, almost verbatim, the self-serving affidavit testimony of Peggy Brittan—Sanders' supervisor in UFS and her primary tormentor—regarding a July 31, 1997 "hard counseling" session that caused Sanders to suffer an emotional breakdown and led Exxon to, once again, bar her from the workplace.[23] The District Court credited Ms.

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[22] *See* Appendix A, at 14a.

[23] In her affidavit, Ms. Brittan testified:

> On July 31, 1997 I counseled with Ms. Sanders regarding a deadline that was missed when she was out sick during the week of July 14, 1997...My purpose was to discuss with Ms. Sanders how we might ensure that no other deadlines were missed like one that occurred while she was out. During this discussion Ms. Sanders became very emotional and cried. Ms. Sanders continued to bring up the allegations surrounding her claims of discrimination by Mr. Schott. I reminded her several times that she was talking about things that I had no knowledge of. She made comments that being at work was a problem and that no one had tried to help her. I reminded her that she had been offered a position in another organization and she had turned the offer down. At the end of the conversation I offered to get a taxi for Ms. Sanders, but she refused. I asked Ms. Sanders to take a few minutes to compose herself before driving herself home. Following my meeting with Ms. Sanders, I prepared detailed notes of my conversation with her. Attached as Exhibit C are true and correct copies of the notes I prepared from my conversation with Ms. Sanders on July 31, 1997. *See* Exxon's Motion for Summary Judgment, Affidavit of Peggy L. Brittan.

In its Memorandum and Order, the District Court described the July 31, 1997 meeting as follows:

> In July, 1997, Sanders missed a deadline while she was out on sick leave for a few days. On July 31, 1997, after Sanders returned to work, Brittan initiated a discussion with her about the missed deadline and tried to discuss ways to avoid missing deadlines in the future. During the discussion, Sanders became very emotional and cried. Sanders made statements like "Exxon is killing me," "I have to look over my shoulder all the time," "I'm unable to work; I'm too upset," I'm sick, but you say it's a performance problem," and "no one will help me." She said she had sought help but there was no resolution of her issues, which she said were "eating her up" and that she was only sleeping two hours a night. Sanders continued to bring up her allegations regarding Gary Schott. Brittan reminded Sanders several times that she was talking about things Brittan had no knowledge

Brittan's self-serving testimony, despite the fact that it was not only controverted by Sanders' affidavit[24] but also contradicted by the deposition testimony of Exxon's nurse, Elizabeth Lawhorn. For example, Lawhorn testified that Brittan was "coming down hard" on Sanders for some time prior to the July, 1997 "hard counseling" session; that Brittan's inability to "move on" resulted in her abusive treatment of Sanders during that counseling session; and that Brittan herself was "part of the problem."[25] The District Court's failure to disregard Exxon's officials' self-serving testimony about their "concern" for Sanders' well-being, especially in the face of such countervailing evidence, is inconsistent with *Reeves*.

III. THE DISTRICT COURT DREW ALL REASONABLE FACTUAL INFERENCES IN FAVOR OF EXXON AND AGAINST JACKIE SANDERS

Finally, in *Reeves*, the Court made clear that, in adjudicating summary judgment motions in Title VII cases, lower courts must draw all reasonable factual inferences from an employee's direct evidence of discrimination in favor of the employee and may not make credibility determinations or weigh the evidence. *Reeves*, 68 U.S.L.W. at 4484. Here, as in *Reeves*, Jackie Sanders adduced direct evidence of Exxon's discrimination, which the District Court either failed to credit or discounted. Such evidence consisted of the following statements made by Exxon's Controller, Bobby Alexander, during a September 17, 1996 meeting with Sanders to discuss her discrimination allegations:

> Alexander: "Look, we don't discriminate against anybody for any reason at all. And when somebody comes along, like yourself or anyone else, that insists that we do, of course we are not going to be happy with them.
>
> * * *
>
> Alexander: If you would trust me, your career would not be screwed up. Now, I'll be the first to admit, I think you are screwing your career up. But it's not too late to stop and turn it around.

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of, and tried to direct the conversation back to the deadline issue. Brittan told Sanders that "other people's lives are not your business." Sanders became so emotional that Brittan tried to convince her to take a cab home, and asked her to at least wait about 10 minutes to compose herself before attempting to drive. *See* Appendix A, at 6a.

[24] In her affidavit, Sanders testified that Brittan berated her at length on July 31, 1997, over a deadline allegedly missed two weeks before and that, when she tried to escape Brittan's tirade, the latter blocked her from leaving the office. R 1/912.

[25] R 1/978, Exhibit P, at 91-92, 153-154.

* * *

Sanders: I talked to the lawyer, I know what's in Title VII. I know what I'm entitled to.

Alexander: What are you entitled to?

Sanders: I'm entitled to the difference between my salary now and what I'm going to make out on the outside.

Alexander: Why are you entitled to the difference between your salary and what you're going to make on the outside?

Sanders: Because that's what Title VII says.

Alexander: And what is Title VII?

Sanders: Title VII is the Equal Employment Opportunity Act that Congress passed.

Alexander: You better—you better get you another lawyer.

* * *

Alexander: We're trying to work with you. You go down to the EEOC and talk to some lawyer who you don't know, who does not know you...[H]e doesn't know anything about the situation other than what you've told him. And you believe him when he says, 'Let me tell you what you're entitled to, Jackie'?

Sanders: Who am I supposed to believe?

Alexander: I would think you would believe us a heck of a lot more—you know, we're part of your family, not him?

Sanders: You're darn right. You were part of my family. You just don't know how much until now.

Alexander: That's what we're trying to do. But you keep—you keep throwing—you keep going against us.

* * *

Alexander: You're out there talking to a lawyer at EEOC—How many times do you think we've been challenged on discrimination?...How many times has anyone demonstrated that we've discriminated against them?

* * *

Alexander: You can take it to the EEOC. And you can take it to court. And we'll see who wins.

Sanders: That's not what I want to do.

Alexander: Well, you know you do want to do that.

Sanders: No. No, Bobby. I don't want to go to court.

Alexander: Well, that's exactly what you're doing.[26]

Although a jury could conclude from these statements that Mr. Alexander — the highest ranking official in Exxon USA Controllers — was attempting to intimidate and coerce Ms. Sanders regarding her EEOC Charge, the District Court summarily concluded:

> It is doubtful that the above comments, taken in context with the entire conversation, could be construed as 'intimidation' or a 'threat' to force Sanders to drop her EEOC Charge."[27]

Additionally, as the Fifth Circuit did in *Reeves*, the District Court discounted Alexander's remarks because it summarily concluded—contrary to the clear record—that Alexander "did not make any 'ultimate employment decision' regarding Sanders."[28]

Finally, the District Court discounted, as direct evidence of retaliation, Alexander's actions and statements regarding Sanders' December, 1996 request to transfer from UFS to a more challenging position. In light of Sanders' qualifications and her emotional state, Exxon management and Human Resource officials regarded a transfer as essential to her survival at Exxon and had recommended to Alexander that he approve her request.[29] Alexander rejected this recommendation and instructed his subordinates to notify Sanders that any transfer would leave a "mark" on her career.[30] Simultaneously, Alexander directed his subordinates to begin subjecting Sanders to "hard counseling," not to "bow" to her, and to "make sure she understands facts."[31]

Faced with this Hobson's Choice, Sanders declined tbe transfer offer that Alexander's subordinates presented her in January, 1997. She argued that, viewed in the context of Alexander's other coercive and intimidating remarks, the transfer "offer" constituted further evidence of Exxon's retaliation. Contrary to *Reeves*, the District Court completely failed to credit Alexander's directive that Exxon management subject Sanders to "hard counseling." Likewise at variance with *Reeves*, the District Court resolved all reasonable inferences against Sanders by holding that Alexander's contemporaneous directive that any transfer

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[26] R R 1/866-872.
[27] Appendix A, at 16a.
[28] Appendix A, at 16a.
[29] R 1/978, Exhibit N, at 212-213.
[30] R 1/854; R 1/978, Exhibit N, at 213, 215.
[31] *Id.* (emphasis original).

would leave a "mark" on her career "does not appear to be a 'threat' but a **legitimate opinion** about corporate perceptions."[32]

CONCLUSION

Because the lower courts failed to apply the *Reeves* standard for summary judgment motions in Title VII cases, the Court should grant certiorari, vacate the lower court judgments, and remand this case for reconsideration in the light of *Reeves*.

Respectfully submitted,

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[32] Appendix A. at 18a (emphasis added).

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JACKIE SANDERS,	§	
	§	
Plaintiff,	§	
	§	
V.	§	CIVIL ACTION NO. H-97-3885
EXXON CORPORATION d/b/a	§	
EXXON COMPANY, U.S.A.,	§	
	§	
Defendant	§	

MEMORANDUM AND ORDER

Pending before the Court is Defendant Exxon Corporation's motion for summary judgment (Dkt. #37) on all the claims asserted by Plaintiff Jackie Sanders. After reviewing the motion, the parties' briefing the record and the applicable law, the Court is of the opinion that Exxon's motion should be GRANTED.

I. Factual and Procedural Background

Exxon hired Jackie Sanders in September 1977. Sanders worked for Exxon for 20 years before resigning her employment on October 16, 1997. In April 1995, Sanders was a supervisor over approximately 10 to 15 accountants in Revenue Accounting East ("***RAE***") within the controller's department. Sanders, who is white, claims that Exxon demoted her to a "dead - end staff position" in November 1995 because she expressed concerns to her supervisor, Gary Schott, in April 1995 and June 1995 that the black, Asian and Hispanic accountants under her supervision were being discriminated against in the company's annual ranking process. Sanders further claims that she was transferred because she refused in October 1995 to lower an Asian employee's evaluation at Schott's direction.

The new position to which Sanders was transferred was the "Crude and Condensate" ("***C&C***") desk in Upstream Financial Services ("***UFS***"). Sanders confirmed in her deposition testimony that her salary and

classification level remained the same after the transfer, she continued to receive pay raises after the transfer, and her ranking within the company remained largely the same.[1] The parties disagree as to who was involved in the decision to transfer Sanders and as to whether the C&C job was beneath Sanders' abilities or constituted a demotion.

During 1996, Sanders began to show signs of stress and depression. In April 1996, Sanders consulted a nurse in Exxon's health department and asked to have her blood pressure checked. Sanders stated that she sometimes felt that her "heart was racing" and that she was feeling "exhausted and pressured" and was not sleeping well due to working long hours at work and spending every weekend caring for her sick mother in San Antonio. The Exxon nurse advised Sanders to see a physician regarding medication to help her sleep, and also suggested that Sanders make an appointment with Exxon's employee assistance program for stress counseling. Sanders testified that during this time she was "depressed" and tended to keep her office door shut and not talk to anyone. She testified that she was not handling things well, not sleeping well, and suffering from stress, anxiety and crying.

In May 1996, Sanders went to see David Middlebrooks, her manager at UFS. Sanders secretly tape - recorded this conversation. The transcript, which Sanders confirmed was accurate, shows that Sanders was very upset and crying. She told Middlebrooks that there was an unspecified "problem" in her former unit, but refused to be more specific, even though Middlebrooks expressed concern and asked her repeatedly to explain. When Sanders told him she was unhappy working in UFS, Middlebrooks offered to move Sanders out of UFS, but Sanders declined the offer. During the conversation, in response to Sanders' comment that she needed someone she could trust, Middlebrooks agreed and remarked that she needed a "soul mate" to confide in. Sanders testified that she was very offended by this comment and interpreted it to mean that he was telling her to "get a mate" in her life.

During June and July of 1996, Sanders testified that her depression was affecting her ability to do her job, and that she "wasn't taking care of myself or my clothes." She testified that she was having "anxiety attacks" and that "everything seemed suspicious" to her - she was afraid her phone

[1] Sanders had received a relative performance ranking of 60 percent while working in UFS. Her ranking for the period April 1994 to March 1996 remained at 60 percent, largely because of positive comments from Schott regarding the period he supervised her before her transfer. However, Sanders' ranking for the period April 1996 to March 1997 dropped to 50 percent.

was being bugged and that someone was following her in the park, and she thought something was in the air making her ill. She testified that her family was tired of hearing about her problems at Exxon, because that was all she talked about. Her brother urged her to get therapy.

On August 16, 1996, after she had been working in her new position in UFS for nine months, Sanders approached Sheila Templeton, RAE manager, and asked why she had been transferred from RAE to UFS nine months earlier, and asked whether she had been transferred for refusing to lower the Asian employee's evaluation in October 1995 as instructed by her supervisor, Gary Schott. Sanders was viably upset and crying. Templeton said she had not known that Sanders was unhappy at UFS, and she explained the reasons for the November 1995 transfer - that Sanders had previously expressed an interest in a financial position, that Templeton thought the position would be a good opportunity for Sanders, that Sanders' need to take care of her mother on weekends could be accommodated in the new position, and that there were some conflicts in the unit Sanders had been supervising in RAE. Sanders made some vague allegations involving Gary Schott, but was reluctant to elaborate. Templeton encouraged Sanders to speak to human resources about the allegations, and, with Sanders' consent, set up a meeting for a few days later, August 20, 1996, between Templeton, Sanders and human resources advisor Jack Hayes. After Sanders left, Templeton called Sanders' supervisor, Dan Jones, and asked him to check on Sanders because she was so upset.

On August 19, 1996, Sanders' UFS manager, Peggy Brittan, called a nurse in Exxon's health department and expressed concern about Sanders, stating that Sanders appeared to be overreacting to work issues and blowing small incidents out of proportion, and that Sanders was not able to deal with criticism of her work. Brittan told the nurse that Sanders could be under stress because she "works all week then drives to San Antonio for the weekend to care for her ill mother." The nurse suggested that Brittan talk to Sanders. express concerns about her health and offer for her to be evaluated by the health services department.

On August 20, 1996, Sanders had the scheduled meeting with Templeton and human resources advisor Jack Hayes. Sanders, visibly upset, complained that Exxon had discriminated the minority accountants formerly under her supervision in RAE, and claimed that she had been transferred to UFS in December 1995, nine months before, in retaliation for her previous complaints to her former supervisor, Gary Schott. During the meeting on August 20, 1996, Sanders was extremely upset and was crying

uncontrollably. She told Templeton and Hayes that she believed that Schott "systematically worked to drop minorities in the rank list." She stated that she had not been able to concentrate and had been making numerous errors in her work. She said she feared for her life because she lived alone and knew Schott's brother was a policeman; she was afraid Schott would "kill her" if he knew of her allegations against him. Templeton and Hayes told Sanders that her allegations were very serious and that they would be investigated. Hayes and Templeton reported Sanders' allegations to Bobby Alexander, controller for Exxon Company U.S.A. On August 28, 1996, Alexander wrote a memo asking Tom Walters in human resources to conduct an investigation into Sanders' allegations.

On August 30, 1996, Sanders filed an EEOC charge alleging that Exxon had retaliated her for having opposed discrimination against the minority accountants.

On September 10, 1996, Hayes contacted Liz Lawhorn, a registered nurse and occupational health coordinator in the health services department, and expressed his concern that Sanders had been very emotional and crying during a September 4 interview with HR representatives, and that she had later been seen "in the corner of the room shaking." The next day, Lawhorn visited Sanders privately in Sanders' office. Lawhorn told Sanders she was concerned about Sanders' emotions and ability to work. Sanders appeared sad and distressed and told Lawhorn that she was "unable to work without crying" and that she believed she had a problem. Lawhorn testified that Sanders told her that "she really appreciated me coming to her and offering assistance because she felt she didn't have anywhere to turn." Lawhorn told Sanders to take sick leave and to call her physician as soon as possible for evaluation. Lawhorn testified that Exxon policy is that, when the medical department believes that an employee may be medically unfit for duty, the employee is asked to be evaluated by a physician for fitness for duty. Sanders was evaluated by her own physician, Dr. Kevin Comfort, on September 19, 1996. Dr. Comfort diagnosed Sanders with "Stress Disorder - Acute" and stated that she was disabled and unable to work until October 7, 1996. Sanders went on paid medical leave.

On September 17, 1996, Sanders, while on medical leave, came up to the Exxon office and spoke to Bobby Alexander. Sanders alleges that Alexander expressed displeasure with her for filing the EEOC charge and stated that she was going against her Exxon "family." She admits, however, that Alexander told her repeatedly that Exxon would investigate

her allegations and would not tolerate discrimination. He wrote down the names of the alleged discrimination victims and told Sanders he would personally go and look at the rankings. In addition, when Sanders stated that she was not happy working her current assignment in UFS, Alexander offered to transfer Sanders to another section of the company or to an affiliate if she wished. In this conversation, which Sanders also tape-recorded, Sanders seems to be upset and crying; Alexander tells her several times to "calm down."

The next day, on September 18, 1996, Lawhorn called Sanders and informed her of Exxon's procedure that employees on medical leave should not come back to the office until released back to work by a physician. Lawhorn also informed Sanders of the Exxon procedure that if she came back to work without having a medical release that she would be escorted off the premises. Sanders was offended by these procedures, but presents no evidence indicating that these procedures were not uniformly applied to all employees on medical leave.

On October 7, 1996, Lawhorn received a work status evaluation form from Dr. John Peake, a psychiatrist, who diagnosed Sanders with "Major Depressive Disorder - Single Episode," and stated that Sanders would be unable to work for a few more weeks. On October 27, 1996, Sanders returned to work, having been cleared by Dr. Peake to do so.[2]

Meanwhile, the human resources investigation into Sanders' allegations had been proceeding. The investigation team interviewed several employees, including Sanders, and examined the rankings to see where minority employees were ranked compared to non-minority employees. On October 18, 1996, the investigation team reported to Alexander its conclusion that the allegations that Gary Schott had intentionally discriminated against minority employees and retaliated against Sanders were unfounded. The investigation team did note that the average ranking of minority employees in the controller's department in 1995 and 1996 was 26 and 31, as compared to the average ranking of non-minority employees, 52 and 56. The team recommended that the controller's department should pay closer attention to the distribution of minority employees in its annual ranking list, and identify areas where training may be needed to address performance problems.

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[2] Sanders confirmed in her deposition testimony that Dr. Comfort and Dr. Peake were not chosen by Exxon, but were her own physicians, and that she believed they had her best interest in mind when making their diagnoses. She also testified that she agreed with her doctors' opinions that she was unfit for work during this time.

After Sanders returned to work, Lawhorn in the medical department occasionally spoke to Sanders about her medical situation and how she was handling her return to work. Sanders' manager, Peggy Brittan, consulted Lawhorn in December 1996 about whether it would be appropriate to have a regular performance discussion with Sanders. Lawhorn replied that Sanders had no work restrictions and that there was no reason not to conduct the performance discussion. Also in December 1996, Hayes and Templeton informed Sanders that the investigation team had completed its review, that recommendations were made and that action was taken, but they declined to discuss the details with her. When Sanders stated again that she was unhappy at UFS, Hayes and Templeton again offered to transfer her to another position, but Sanders refused.

In 1997, Sanders continued to work at the C&C desk. Brittan periodically counseled Sanders regarding errors in her work, problems with coworkers and a missed deadline. Sanders complains about several February 1997 counseling sessions in which Brittan engaged her in pointed discussion about her performance problems and threatened to call the medical department again and have her examined because of her emotional state. Sanders contends Brittan was harassing her in retaliation for her protected activity, but she admitted in her deposition that she was having problems in her job at that time and was making mistakes and had gotten upset and cried in another meeting with Brittan a few days before.

In July 1997, Sanders missed a deadline while she was out on sick leave for a few days. On July 31, 1997, after Sanders returned to work, Brittan initiated a discussion with her about the missed deadline and tried to discuss ways to avoid missing deadlines in the future. During the discussion, Sanders become very emotional and cried. Sanders made statements like "Exxon is killing me," "I have to look over my shoulder all the time," "I'm unable to return to work; I'm too upset," "I'm sick, but you say it's a performance problem," and "no one will help me." She said she had sought help but that there was no resolution of her issues, which she said were "eating her up" and that she was only sleeping two hours a night. Sanders continued to bring up her allegations regarding Gary Schott. Brittan reminded Sanders several times that she was talking about things Brittan had no knowledge of, and tried to direct the conversation back to the deadline issue. Brittan told Sanders that "other people's lives are not your business." Sanders became so emotional that Brittan tried to convince her to take a cab home, and asked her to at least wait about 10 minutes to compose herself before attempting to drive. That evening, Sanders testified, she sought treatment at a hospital emergency room and talked to

the nurses there for about an hour, but left when the nurses said they wanted to admit her to the hospital.

After the July 31 meeting, Brittan again contacted Lawhorn in the medical department regarding Sanders' emotional state, and Lawhorn met with Sanders in the morning on August 5, 1997. During this meeting, Sanders was very emotional and stated her belief that Exxon was trying to get rid of her. She was very upset about Brittan's criticism of her work. Lawhorn placed Sanders on disability leave until she could be evaluated by a physician. Sanders went back to her desk and did not want to leave the office, but Brittan told her that she had been placed on medical leave and that if she did not leave the office Brittan would call security or the medical department. The parties disagree about whether Lawhorn insisted that Sanders be evaluated by a physician "chosen by Exxon." At any rate, Sanders remained on medical leave and was evaluated by her own psychiatrist, Dr. Peake, who diagnosed her with "Major Depressive Disorder" on August 28, 1997 and opined that she was disabled and unable to work until October 15, 1997. Sanders testified that she agreed with Dr. Peake's conclusion that her emotional state made her unfit for work during this time.

Sanders remained on medical leave until October 16, 1997, when she arrived at Exxon's medical department and declared her intention to resign. Lawhorn and Hayes tried to convince Sanders not to resign, and again offered to transfer her away from UFS if she so desired, but Sanders declined the offer and insisted on submitting her resignation.

II. Summary Judgment Standard

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Little v. Liquid Air Corp.*, 37 F. 3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam). The movant bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Calrett*, 477 U.S. 317, 323 (1986). The movant who is a defendant may discharge its burden by pointing out an absence of proof on any one of the essential elements of the plaintiff s claim. *Celotex*, 477 U.S. at 325. Once the movant has done so, the burden shifts to the non-movant to designate specific facts showing that summary judgment should not be granted. *Id.* at 321-25; *Wallace v. Texas*

Tech. Univ., 80 F. 3d 1042, 1047 (5th Cir. 1996). When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in favor of the non-movant. *See Samuel v. Holmes*, 138 F.3d 173, 176 (5th Cir. 1998); *Texas v. Thompson*, 70 F.3d 390, 392 (5th Cir. 1995). The non-movant does not satisfy her burden with "some metaphysical doubt as to the material facts," by "conclusory allegations," by "unsubstantiated assertions," or by only a "scintilla of evidence." *Little*, 37 F.3d at 1075. Only a genuine dispute over a material fact - one capable of affecting the outcome under existing law - will preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *see also Hanchey v. Energas Co.*, 925 F.2d 96, 97 (5th Cir. 1990) (fact issue must be "outcome determinative").

IV. Discussion

Sanders alleges Title VII retaliation, retaliation under 42 U.S. C. § 1981, and intentional infliction of emotional distress under Texas law.

1. Title VII Retaliation

Sanders alleges that Exxon retaliated against her in violation of Title VII because she complained that Exxon was discriminating against the minority accountants under her supervision, and because she filed an EEOC charge. Sanders does not allege that Exxon discriminated against her personally, only that it discriminated against other employees and retaliated against her when she opposed that discrimination.

Title VII imposes liability for unlawful retaliation where (1) the employee engaged in activity protected by Title VII; (2) the employer took adverse employment action against the employee; and (3) a causal connection exists between that protected activity and the adverse employment action. *See Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F. 3d 364, 372 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 798 (1999). The ultimate determination in a Title VII retaliation case is whether, "but for" the protected conduct, the employer would not have engaged in the adverse employment action. *Id.*

Activities protected by Title VII fall into two broad categories - opposition and participation. An employee has engaged in protected activity when she has (1) "opposed any practice made an unlawful employment practice" by Title VII or (2) "made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding or hearing" under Title VII.

Id. Sanders claim protection under both the opposition and participation clauses. She claims that she opposed discrimination by complaining to Schott in April 1995 that an Asian accountant she supervised was ranked too low and should be ranked higher. Sanders claims that Schott disagreed and remarked that the employee was not very aggressive and was very quiet and "that was the way the Vietnamese are." Sanders argued that the employee should not be penalized because of her "culture." In June 1995, after the employee rank fist became available, Sanders complained to Schott that the minority employees in her unit were not being treated fairly and that they were all "on the bottom of the rank fist." She said Schott told her that the lower rankings for the minority employees were not a problem because the list would be merged with the ranking list in another unit, and the distribution would "average out." In October 1995, Sanders and Schott had a disagreement about the Asian employee's evaluation; Schott told Sanders to mark the employee "below most" and add comments explaining the employee's low ranking as was required by Exxon policy, but Sanders refused to follow Schott's instructions because she believed the employee's low ranking was due to discrimination. Sanders' opinion was that any negative comments about the employee's performance would be "a lie." The evaluation was ultimately not changed because Sanders had - again, contrary to Exxon policy - already discussed the evaluation with the employee before it was finalized.

Sanders, to prevail on her retaliation claim, does not have to prove the merits of her allegations that Exxon discriminated against these employees. Sanders must prove only that she had a reasonable belief that her opposition to discrimination was valid. *See, e.g., Long v. Eastfield College*, 88 F.3d 300, 304 (5th Cir. 1996) (holding that the opposition clause of 42 U.S.C. § 2000e-3(a) requires the plaintiff employee to demonstrate that she had at least a reasonable belief that the practices she opposed were unlawful). The Court has reviewed the briefing and summary judgment evidence regarding Sanders' allegations, and concludes that Sanders has at least raised a genuine issue of material fact on whether she had a reasonable belief that discrimination was occurring. However, the issue of whether any minority employee has or had a viable claim of discrimination against Exxon is not before this Court.

In retaliation for her "opposition," Sanders alleges, Schott "repeatedly undermined [her] supervisory authority" and "had her removed

as a supervisor and reassigned to a dead-end staff position in another area of the company." This allegation refers to Sanders' transfer to UFS in November 1995.

Sanders also alleges that she opposed discrimination by making an "internal complaint" of discrimination and retaliation to Templeton and Hayes in August 1996. She claims protection under the "participation" clause because she filed an EEOC charge in August 1996.

In retaliation for this additional opposition and participation, Sanders alleges that Exxon "contrived to have [her] removed from her job and placed on medical leave." She also alleges that Alexander, controller of Exxon U.S.A., "attempted to intimidate and threaten her: "Alexander admonished [her] that she was 'screwing [her] career up' and accused her of betraying the Exxon 'family' by consulting with legal counsel and filing a Charge of Discrimination with the EEOC," Sanders alleges.

Sanders finally contends that, from October 1996 to October 1997, Exxon "systematically badgered, harassed, and humiliated her in a calculated effort to destabilize her psychologically and make her quit," resulting in her constructive discharge on October 16, 1997.

The Fifth Circuit has repeatedly held that "Title VII was deigned to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *See, e.g., Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.), *cert. denied*, 118 S. Ct. 336 (1997). "Ultimate employment decisions" include acts "such as hiring, granting leave, discharging, promoting, and compensating." *Id.*

Exxon argues that Sanders has not alleged an ultimate employment decision. The Court agrees that Sanders has alleged many minor incidents that she characterizes as "retaliation," which are clearly not "ultimate employment decisions" but the "interlocutory or mediate decisions" that *Mattern* holds non-actionable.[3] However, the Court will assume *arguendo*

[3] For example, Sanders claims, *inter alia*, that Schott "undermined her authority" by not inviting her to meetings and forcing her to apologize to one of her employees. She also complaints that Middlebrooks told her she needed a "soul mate," that an Exxon attorney (who is black) improperly asked her to sign an interrogatory verification in an unrelated legal matter before the answers were drafted, that Middlebrooks refused to let her leave work on day to seek treatment for an infected eye, that she was ordered not to be on Exxon premises while on medical leave and was escorted out of the office, that she was "counseled" harshly for minor mistakes in her work, that she was threatened with another transfer (out of UFS) if she took leave to take care of her ill mother, that the only interesting

that Exxon's decision to transfer Sanders to UFS[4] and its decision to place Sanders on medical leave were "ultimate employment decisions." The Court also notes that constructive discharge, if proven, can be an ultimate employment decision.

A. Transfer to UFS in November 1995

Thus, the Court turns to the question of whether Exxon's transfer of Sanders to the UFS position in November 1995 was retaliatory. Viewing the facts in the light most favorable to Sanders, the Court will summarize the evidence regarding the UFS transfer. Sheila Templeton, who became Sanders' manager in RAE in April 1995, testified that the RAE accounting supervisor positions such as the one Sanders held in 1995 were by nature "rotational" positions and were not permanent assignments. Thus, there were other employees waiting to rotate into RAE supervisory positions. Sanders recognized the rotational nature of the RAE supervisor positions in her deposition. In addition, Sanders testified that she "had always wanted" to be assigned to UFS and had filled out a form expressing interest in such a position. Sanders testified that when a fellow RAE supervisor, Diane Saxon, was transferred to UFS in 1993, Sanders told Schott that she also wanted to be transferred to UFS because it was considered to be a prestigious place to work. Templeton testified that she identified Sanders as a good candidate for a UFS position that was open in June 1995, because Sanders had good analytical skills and could develop professionally by

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duties in her UFS job were taken away from her, that Exxon refused to divulge details of its investigation into her allegations of discrimination, that UFS employees contracted her at home during her medical leave, that Exxon medical staff contacted her physician without her permission, and that Exxon tried to require her to see a physician "chosen by Exxon." None of these actions are "ultimate employment decisions," and therefore they cannot on their own support a claim of Title VII retaliation. *See Mattern*, 104 F.3d at 707-09 (noting that none of the following are ultimate employment decisions: hostility or "staring" from fellow employees, having tools stolen, a supervisor's visit to the employee's home, a verbal threat of termination, a reprimand, being placed on "final warning," refusing the employee permission to attend a conference, giving employee false information, criticizing the employee's work to a vendor, delayed receipt of a reimbursement check, deleting the employee's data from a form, criticizing an employee's EEOC complaining); *see also Messer v. Meno*, 130 F.3d 130, 139-40 (5th Cir. 1997) (holding that employer's actions – including failure to resolve employee's internal grievance, monitoring her conversations, criticism of her work and conduct, ignoring her input, denying permission for her to represent the company at certain functions and downsizing her department – were not ultimate decisions), *cert. denied*, 119 S. Ct. 794 (1999).

[4] It is not clear that the transfer to UFS was a materially adverse employment action. *See, e.g., Burger v. Central Apt. Mgt.*, 168 F.3d 875, 879 (5th Cir. 1999) (noting that "a transfer involving no reduction in pay and no more than a minor change in working conditions" is not an ultimate employment action, because "[o]therwise, every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit").

getting financial experience at UFS. So Templeton recommended Sanders for the UFS position in June 1995 and instructed Sanders' supervisor, Schott, to inform her of the transfer. Sanders testified that Schott insisted that the transfer was a "done deal" and told her it would hurt her career to refuse the transfer. Sanders told Templeton that she could not take the UFS job because it would require weekend work, which would conflict with Sanders' obligation to be out of town most weekends to care for her ill mother. "I talked to Sheila about it and told her that I had always wanted to go to UFS; but at this point in time in my fife, I couldn't," Sanders testified. Templeton said she understood Sanders' personal situation and would not require her to transfer to UFS. Sanders asked if refusing the transfer would be a "black mark" on her career, and Templeton assured her that it would not. Jane Beaty, another RAE supervisor, was transferred to UFS instead in June 1995.

In October 1995, another opening came up in UFS. Templeton again considered Sanders for the job. She discussed the job requirements with David Middlebrooks, manager of UFS, and Middlebrooks assured Templeton that the job would have only limited overtime and weekend work so as to not conflict with Sanders' personal responsibilities. Templeton also considered as a factor that Sanders had some interpersonal problems with some of her subordinates and tended to do work herself rather than delegating. In addition, there was another employee returning from a family leave that Templeton wanted to rotate into a RAE supervisor position. Templeton also consulted Sanders' supervisor, Schott, and her own supervisor, Pat Mulva, who agreed to the transfer. Thus, Templeton recommended Sanders for the UFS position, and the personnel subcommittee, of which Templeton was a member, approved the transfer. Templeton told Schott to inform Sanders of the transfer. Sanders testified that Schott "assured me that it was a good opportunity, and they were going to work the issue with my mother. Then I felt comfortable with it because I had always wanted to go to UFS." Sanders testified that when she later became aware that the UFS job was the C&C close-out desk, she was not pleased because she thought the time-sensitive close-out deadlines would conflict with her obligations to her mother. She also introduced evidence to show that the C&C job was not challenging, that it had been filled in the past by entry-level employees, and that several previous holders of the C&C job had since quit Exxon. Exxon submits evidence that the job was important and challenging and had responsibilities that could expand or contract with the qualifications of the employee holding the position. It is undisputed that Sanders' salary and classification remained the same after the transfer.

At any rate, whether or not the transfer was a "demotion," the evidence shows that the people involved in the decision to transfer Sanders to UFS in November 1995 were Sheila Templeton, David Middlebrooks, and to a much lesser extent, Pat Mulva and Gary Schott. Exxon introduces evidence showing that Templeton, Middlebrooks and Mulva did not know in November 1995 that Sanders had complained to Schott about the minority rankings or refused to lower the Asian employee's ranking at Schott's direction. Sanders admits, in her deposition testimony that she has no evidence to show that any of these individuals knew of her opposition activities in October and November 1995. Because Templeton, Middlebrooks and Mulva did not know of Sanders' opposition at the time they participated in the decision, they could not have had retaliatory intent in effecting Sanders' transfer to UFS. *See Watts v. Kroger Co.*, 170 F.3d 505, 1999 WL 147382, at *6 (5th Cir. March 17, 1999) (holding that employer "could not retaliate" plaintiff "because it did not know she has engaged in protected activity"). Schott clearly knew about Sanders' opposition, but the evidence, even viewed most favorably to Sanders, indicates that Schott had only a tangential role, if any, in effecting Sanders' transfer to UFS. Sanders' burden in a Title VII retaliation case is to prove that "but for" her opposition, she would not have suffered the adverse employment action. *See Long v Eastfield College*, 88 F.3d 300, 305 n.4 (5th Cir. 1996). Sanders has not produced enough summary judgment evidence to raise a genuine issue of material fact on the issue of causation. The undisputed evidence indicates that Sanders would have been transferred to UFS "even in the absence of the protected conduct." *Id.* Templeton, who had no knowledge of Sanders' opposition, played the major role in initiating and effecting the transfer, and articulated numerous business reasons for the transfer, prominent among them the fact that Sanders had repeatedly expressed interest in a UFS position. Templeton did not merely "rubber stamp" a recommendation from Schott to transfer Sanders. Thus, even assuming *arguendo* that Schott encouraged the decision to transfer Sanders with a retaliatory motive to punish her for her opposition to discrimination, his small role in the decision still would not establish the required "but-for" causation. *See Long*, 88 F.3d at 306-07 (decision to terminate employee was recommended by supervisor who had knowledge of opposition, but final decision to terminate was made by college president with no knowledge of opposition; court noted that the plaintiff could not show "but-for" causation if the president conducted "his own independent investigation" rather than "rubber stamping" supervisor's recommendation). Accordingly, the Court will grant Exxon's motion for summary judgment regarding Sanders' claim that her November 1995 transfer to UFS was retaliatory.

B. Medical Leave

Sanders alleges that Exxon "contrived" to have her removed from her job and placed on medical leave, apparently in retaliation for her complaints to Templeton and Hayes and her filing of an EEOC charge in August 1996. However, the undisputed evidence, including Sanders' own deposition testimony, indicates that Sanders was suffering from symptoms of depression, stress and anxiety as far back as April 1996, four months before she approached Templeton and Hayes or filed an EEOC charge. Additionally, Sanders confirmed in her deposition testimony that, shortly before she was placed on leave both in 1996 and 1997, she was extremely troubled and emotional, often crying uncontrollably whenever anyone attempted to discuss problems with her work or the state of her health. Affidavits or deposition testimony from Templeton, Brittan, Hayes, and Lawhorn indicates that they acted out of concern for Sanders' emotional health, and - most importantly -- upon the orders of Sanders' physicians. Sanders testified that she, not Exxon, chose Dr. Comfort and Dr. Peake, and that she agreed with their conclusions that she was unfit for work from September 11, 1996 to October 27, 1996, and from August 5, 1997 to October 15, 1997. Sanders has not produced evidence to raise a genuine issue of material fact regarding whether these compelling reasons to place her on medical leave were merely pretexts for retaliation.

C. Alleged threats and intimidation by Alexander

Sanders places great emphasis on several comments made by Bobby Alexander when she met with him shortly after she went on her first medical leave in 1996. Sanders contends that Alexander told her she was "screwing [her] career up" because she had filed the EEOC charge and accused her of betraying her Exxon "family." She claims these comments constitute threats and an attempt to intimidate her into dropping her EEOC charge. Sanders tape-recorded the September 1996 conversation with Alexander, and she attached a transcript of that tape recording to her summary judgment response. When the full conversation is reviewed, it appears that Sanders' complaint takes several of Alexander's comments out of context. The 11-page, single-spaced transcript shows that Alexander tried to calm Sanders down, listened to her detailed story regarding the alleged discrimination and retaliation, asked questions to clarify her allegations, and told her several times that Exxon would not tolerate any discrimination and that her allegations would be investigated. He took down the names of the alleged discrimination victims and promised her he would personally look at the rankings and meet with her again. During this conversation, Alexander also made the following comments:

"Look, we don't discriminate against anybody for any reason at all. And when somebody comes along, like yourself or anyone else, that insists that we do, of course we are not going to be happy with them. I mean, how can you think we would be -- be reasonable."

In response to Sanders' comment that she waited so long to come forward because she "didn't want to ruin her career. And its already screwed up, what little of it I have," Alexander replied, "If you would trust me and listen to me, your career would not be screwed up. Now, I'll be the first to admit I think you're screwing your career up. But it's not too late to stop it and turn it around.

"Now why did you go off and file an EEOC?"

In response to Sanders' statement that an EEOC lawyer had told her about all the damages she was entitled to, Alexander said, "you've got some lawyer out there that does not even have the facts . . about this situation... he doesn't know what he is talking about."

"The point is, you've got a group here at Exxon that thinks a lot of you, but - come on now, don't roll your eyes. We're trying to work with you. You go down to the EEOC and talk to some lawyer who you don't know, who does not know you. He is now - he doesn't know anything about the situation other than what you've told him. And you believe him when he says, 'Let me tell you what you're entitled to, Jackie:

Sanders: "Who am I supposed to believe?"

Alexander: I would think you would believe us a heck of a lot more -- you know, we're part of your family, not him."

Sanders: "You're darn right. You were part of my family. You just don't know how much until now.

Alexander: "That's what we're trying to do. But you keep - you keep throwing - you keep going against us."

"I will look into the facts here. But it's possible we don't agree with you.... You can take it to the EEOC. And you can take it to court. And we will see who wins."

Alexander also commented that it was unlikely that Schott could have single-handedly lowered minority employees' rankings as Sanders alleges, because the ranking process is designed to be a group effort, with input from many supervisors and managers. Alexander also tried to explain the Exxon policy that Sanders violated by refusing to follow Schott's direction to mark "Below Most" on the Asian employee's evaluation:

"[W]e go into a ranking process using the process that is thought through thoroughly, as the one we use, and that employee comes out let's say in the bottom 20 percent, I guarantee you they are 'Below Most.' And it's wrong to go back and tell an employee anything other than the honest truth. On a relative ranking they are in the bottom 15, bottom 20, bottom 10 percent. They are 'Below Most.'"

Sanders: "But I'm forced to make up comments to say why they are 'below most'?"

Alexander: "No. No. No."

Sanders: "Yes. Gary told me to do that."

Alexander: "No."

Sanders: "He forced me to do it."

Alexander: "I guarantee you that if someone ranks in the bottom 10, 15, 20 percent, there are reasons.

It is doubtful that the above comments, taken in context with the entire conversation, could be construed as "intimidation or a "threat" to force Sanders to drop her EEOC charge. Even if Alexander's comments could be construed as a threat, such a threat would not be an "ultimate employment decision" that would support a Tide VII retaliation claim. *See, e.g., Mattern*, 104 F.3d at 708 (noting that "criticizing [an employee's] EEOC charge" or even making "a verbal threat of being fired" does not constitute retaliation). In addition, Alexander did not make any "ultimate employment decision" regarding Sanders. He was not involved in the decisions to transfer her or put her on medical leave. In fact he avers that

he never spoke to her personally again after the above meeting in September 1996. Sanders does not allege that Alexander did anything to "constructively discharge" her during the months leading up to her resignation in October 1997. In fact, she confirmed that Alexander made an offer to move her out of UFS, which she declined. In addition, Alexander avers that he "personally made sure that Ms. Sanders would be welcomed back to Exxon upon her expected return in October, 1997." Accordingly, the Court concludes that Sanders' claim of retaliation based on Alexander's comments cannot withstand summary judgment.

D. Constructive Discharge

"Constructive discharge" is not an independent cause of action, but merely a concept that allows a plaintiff who resigns under certain conditions to nonetheless satisfy the "discharge" element of the applicable cause of action. *See, e.g., Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 925 (5th Cir. 1982). In this case, Sanders must prove constructive discharge to show an "ultimate employment action" to support her claim of Title VII retaliation. "To show constructive discharge, an employee must offer evidence that the employer made the employee's working conditions so intolerable that a reasonable employee would feel compelled to resign." *Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997). A constructive discharge claim requires a "greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment." *Landgraf v. USI Film Products*, 968 F.2d 427, 430 (5th Cir. 1992), *aff'd*, 511 U.S. 244 (1994). The test is objective, the question is not whether Sanders felt compelled to resign, but whether a reasonable employee would have felt so compelled. *Barrow v. New Orleans Steamship Ass.*, 10 F.3d 292,297 n.19 (5th Cir. 1994).

Sanders alleges that, upon her return from leave in October 1996, "Exxon systematically badgered, harassed, and humiliated her in a calculated effort to destabilize her psychologically and make her quit." However, the summary judgment evidence does not raise a fact issue regarding constructive discharge. In December 1996, Hayes told Sanders that "no one wants you to quit" and that "we are glad to have you back." Sanders complains that she was unhappy in the UFS job and felt like she had been demoted. But she admits that at least seven supervisors and managers offered to help her find a new position at various times during 1996 and 1997, and that each time she received such an offer, she refused it, saying on least one occasion that her UFS job "wasn't a problem." She points to a statement by Alexander, relayed to her by Templeton, that, in Alexander's opinion, her leaving the UFS job would make it appear later

that she had failed in UFS and might leave a "mark" on her career. Because of this comment -- which does not appear to be a "threat" but a legitimate opinion about corporate perceptions -- Sanders chose not to accept a transfer. Sanders claim that in March 1997, her supervisor, Dan Jones, told her that she would be transferred out of UFS if she took leave to care for her mother, so Sanders chose not to take the leave, Sanders complains that the Dataflex duties that she found interesting were taken away from her in March 1997. Finally, Sanders complains that her manager, Brittan, moved up several deadlines to make it difficult for Sanders and "seized upon minor errors in Sanders' work to reprimand her about 'performance issues.'" Sanders also complains about Brittan's criticism of her on July 31, 1997, but Sanders admits that she had missed a deadline, that at the time she was depressed and "hysterical," and that she agreed with her psychiatrist's opinion a few weeks law that she was suffering from major depression and was unfit to work. Sanders alleges that she was "forced" to take medical leave in August 1997, but as discussed above, the evidence shows, and Sanders herself admitted, that she was in fact unfit to work at that time as stated by her own psychiatrist. There is no evidence of any harassment during the two and a half months that Sanders was on medical leave before she resigned. She received full pay during her medical leave. Sanders testified that she did not decide to resign until October 16, 1997, the day she walked into the Exxon medical department and submitted her resignation to Lawhorn and Hayes. She testified that both Lawhorn and Hayes tried to convince her not to resign and that they again offered to transfer her to another position if she desired. When an employer tries to convince the employee not to resign and tries to address the employee's concerns, those actions are by definition not constructive discharge. *See Alvey v. Rayovac*, 922 F. Supp. 1315, 1333 (W.D. Wisc. 1996) (finding no constructive discharge when plaintiff had the option to transfer to another department away from offensive supervisor); *Hammon v. DHL Airways*, 980 F. Supp. 919, 926 (S.D. Ohio 1997) (finding no constructive discharge when supervisors tried to convince plaintiff not to resign and offered to allow him to change supervisors), *aff'd*, 165 F.3d 441 (6th Cir. 1999); *Coffman v. Tracker Marine*, 141 F.3d 1241, 1247 (8th Cir. 1998) (finding no constructive discharge when supervisor tried to prevent employee's resignation and attempted to solve the problem).

The Court concludes based on the summary judgment evidence that Sanders has not raised a genuine issue of material fact on constructive discharge. Although Sanders appeared to be genuinely distressed and may have been rudely treated on a few occasions, the incidents she relates would not have caused a reasonable pawn to reign. *See Coffman*, 141 F.3d at 1247 (holding that dissatisfaction with a work assignment, feelings of

being unfairly criticized, or difficult or unpleasant working conditions, even an environment "tinged with retaliatory acts," are not so intolerable as to compel a reasonable person to resign); *Hammon*, 980 F. Supp. at 926 (holding that "verbal attack" by supervisor was "likely unpleasant" but did not rise to the level of constructive discharge); *Alvey*, 922 F. Supp. at 1333 (holding that difficulty in obtaining information, not being assigned challenging assignments, and unfriendly co-workers did not constitute constructive discharge). Accordingly, because Sanders has not raised a fact issue on constructive discharge, the Court will grant Exxon's motion for summary judgment on Sanders' Title VII retaliation claim.[5]

2. Intentional infliction of emotional distress claim

Sanders asserts a Texas law claim for intentional infliction of emotional distress ("IIED") against Exxon. An IIED plaintiff must prove (1) that the defendant acted intentionally or recklessly; (2) that the conduct was extreme and outrageous; (3) that the actions of the defendant caused the plaintiff emotional distress; and (4) that the emotional distress was severe. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). Whether conduct is "extreme and outrageous" is a question of law appropriate for resolution on summary judgment. *See Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993). Conduct is not "extreme and outrageous" unless it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31, 33 (5th Cir. 1992). Moreover, an IIED claim "will not lie when the acts complained of arise in the employment context, even though the conduct may be deplorable and even though it may rise to the level of illegality." *Thompson v. City of Arlington*, 838 F. Supp. 1137, 1154 (N.D. Tex. 1993); see also *Gearhart v. Eye Care Ctrs. Of Am., Inc.*, 888 F. Supp. 814, 823 (S.D. Tex. 1995) ("Only in the most unusual of cases does the conduct move out of the 'realm of an ordinary employment dispute' into the classification of 'extreme and outrageous....'")

It is clear by an examination of the summary judgment record that the conduct of the Exxon supervisors and managers at issue in this case,

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[5] Sanders also alleges retaliation under 42 U.S.C. section 1981. As Exxon argues, it is not clear whether Sanders has a viable retaliation claim under Section 1981, which prohibits racial discrimination that impairs the right to make and enforce contracts. However, the Court need not reach this question, because any Section 1981 claim would fail for the same reasons as her Title VII retaliation claim. *See Thomas v. Exxon Co., U.S.A.*, 943 F. Supp. 751, 758 (S.D. Tex. 1996) (holding that retaliation claims under Section 1981 and title VII are analyzed under the same framework), *aff'd*, 122 F.3d 1067 (5th Cir. 1997).

even when viewed in the light most favorable to Sanders, does not even remotely approach extreme and outrageous conduct. The Fifth Circuit has held that conduct more severe than what Sanders alleges is not extreme and outrageous as a matter of law. *See, e.g., Ward v. Bechtel Corp.*, 102 F.3d 199, 203 (5th Cir. 1997) (employee subjected to open hostility and physical threats from co-worker); *Atkinson v. Denton Pub. Co.*, 84 F.3d 144, 151 (5th Cir. 1996) (employee subjected to termination, defamation, rudeness). "In order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees. Not all of these processes are pleasant for the employee." *Merrell Dow*, 965 F.2d at 33-34 (granting summary judgment on IIED claim against employee subjected to constant criticism, harassment during psychiatric care, and termination during disability leave). Because Sanders has not raised a fact issue on whether Exxon subjected her to "extreme and outrageous conduct," summary judgment in favor of Exxon is appropriate as to Sanders' IIED claim.

V. Conclusion

Therefore, for the reasons set out in this order, Exxon's motion for summary judgment (Dkt. #37) is GRANTED.

Signed this 7th day of May, 1999.

/s John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20457

JACKIE SANDERS
Plaintiff – Appellant

v.

EXXON CORPORATION, doing business as Exxon Company USA
Defendant - Appellee

Appeals from the United States District Court for the
Southern District of Texas, Houston
(H-97-CV-3885)
February 18, 2000

Before BARKSDALE, BENAVIDES and STEWART, Circuit Judges.

PER CURIAM:*

AFFIRMED. See 5th Cir. R. 47.6

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*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20457

JACKIE SANDERS
Plaintiff – Appellant

v.

EXXON CORPORATION, doing business as Exxon Company USA
Defendant - Appellee

Appeals from the United States District Court for the
Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 02/18/00, 5 Cir., _____, _____ F.3d _____)

Before BARKSDALE, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35) , the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in

favor (Fed. R. App. and 5th Cir. R. 35) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s Fortunato P. Benavides
United States Circuit Judge

Dated: April 5, 2000